to regard the public interest as a whole is apparent.[6] Indeed, state regulation would be rendered ineffective if particular unprofitable parts of the enterprise could be discontinued at will.[7]

Where, however, the operation of the entire road has been abandoned by an insolvent carrier, mandamus is refused.[8] These cases have been rested either on the restriction upon state regulation imposed by the Fourteenth Amendment,[8] or on the theory that the financial failure of the enterprise indicates a lack of public demand for its continuance.[9] It is, however, suggested in the general law on this subject that an arbitrary abandonment of the franchise might be denied.[10] If the grantee is an agent of the state in conducting the public enterprise, as the relation is sometimes conceived, or is a trustee for the state of the property and interests acquired by exercise of the franchise, the obligation to continue operations would seem clear; for this agency would involve a contractual obligation. Just here, however, is a difficulty; for though a contract between the state and the grantee is admittedly conceivable, yet in the usual grant of a permissive franchise the elements of contract are entirely lacking. Indeed, if the relation between state and grantee was based on contract, obviously the Fourteenth Amendment would not apply. Again, the grantee is not properly a trustee with the duty to continue the trust until relieved from office; for the state is interested in no wise in the ownership, but only in the use, of the property. Then, if the Fourteenth Amendment protects the property of the grantee, it would seem that its provisions should equally protect his liberty; and that a duty imposed by the state to continue a use of the franchise would violate this fundamental right. But aside from the constitutional protection thus afforded, it is submitted that a public franchise merely grants permission to exploit an enterprise in which the state is necessarily interested; that the power of the state is limited to regulation of the actual exercise thereof; that this enterprise voluntarily engaged in may be discontinued at will; and that the service of the public, upon which the exercise of the franchise is based, involves only the duty not to discontinue until after reasonable notice is given.[11] In a recent case mandamus was allowed ordering a municipal corporation to continue the exercise of a ferry franchise. *In the Matter of Wheeler*, 40 N. Y. L. J. 1117 (N. Y., Sup. Ct., Dec. 1908). It is clear that the legislature may direct the conduct of a municipality and impose pecuniary burdens.[12] And support for this case must be found in a legislative direction for such continuance contained in the franchise granted.[13]

THE VIRGINIA RATE CASES. — For many years an approved method of attacking unconstitutional state legislation has been to ask a federal court to enjoin state officers from enforcing it. Given the ordinary grounds for equitable and federal jurisdiction, the injunction issued,[1] despite the

[6] Savannah Canal Co. *v.* Shuman, 91 Ga. 400; People *ex rel.* Town of Schaghticoke *v.* Troy & Boston R. R. Co., 37 How. Prac. (N. Y.) 427.

[7] See 21 HARV. L. REV. 49.

[8] Ohio & M. Ry. Co. *v.* People, 120 Ill. 200; Jack *v.* Williams, 113 Fed. 823.

[9] See Commonwealth *v.* Fitchburg R. R. Co., 12 Gray (Mass.) 180.

[10] See note, 24 L. R. A. 564; Akron *v.* East Ohio Gas Co., 53 Oh. L. Bull. 218 (Oh. C. P., Nov. 1908).

[11] Indianapolis Gas Co.'s Case, 35 Chic. Leg. News 165 (Dec. 30, 1902).

[12] Prince *v.* Crocker, 166 Mass. 347.

[13] See Mayor, etc., of N. Y. *v.* Starin, 106 N. Y. 1, 15, 16.

[1] Smyth *v.* Ames, 169 U. S. 466.

Eleventh Amendment.[2] The remedy was peculiarly applicable to railroad rate regulation, since the complaining company could usually show the likelihood of irreparable damage or multiplicity of actions under the statute or rate alleged to be invalid. The legislatures accordingly provided regular methods of access to the state courts, for the purpose of reviewing the acts of the rate-making body;[3] but it was held that the state could not limit the railroads to relief in the state courts, either negatively by furnishing an adequate remedy at law,[1] or by positive prohibition of recourse to the federal courts.[4] Such being the situation, the Supreme Court has recently announced that a carrier complaining of a rate fixed by a state commission must first exhaust the remedies in the state courts provided by the statute before it applies to the federal court for an injunction. *Prentis* v. *Atlantic Coast Line Company*, U. S. Sup. Ct., Nov. 30, 1908. No precedents are cited for this sudden modification of an established procedure, nor have any been found; nevertheless similar sets of facts have occurred before.[5] It is true that here the state provided an appeal from the commission to a state court which was given power, upon reversing the order appealed from, to substitute an order of its own;[6] whereas in previous cases the complainant's remedy, whether by independent action in a court of first instance or by appeal, was considered a means of judicial, not legislative, review.[7] Hence there is much force in the majority's argument that the federal judge should wait, before restraining the enforcement of legislation, for the state completely to legislate. This reasoning narrows the decision to the particular facts, which are not likely to occur in other states.[8]

A broader ground, suggested by the majority opinion, is that of comity between the two systems of government. The plaintiff who applies for an injunction against invalid state legislation is not compelled,[1] as is generally the prisoner who applies to a federal judge for a writ of *habeas corpus* alleging detention by the state in violation of the Constitution,[8] to reach the Supreme Court only by writ of error from the appellate state tribunal. Perhaps the present decision establishes a course midway between the former liberal attitude toward injunction bills and the stricter rule in *habeas corpus* proceedings. The policy is to adopt those methods which are most apt to produce harmony between the federal judiciary and the states.[9]

THE APPOINTMENT OF A RECEIVER FOR A CORPORATION DE FACTO. — A recent case suggests the question whether it is proper for a court to appoint a receiver in the case of a *de facto* corporation. *Matter of New York, W. & B. Ry. Co.*, 193 N. Y. 73. The question was not squarely raised in the case, because the defect in incorporation was later cured *ab initio* under statutory provision. There is little authority directly on the point, but it

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[2] See 21 HARV. L. REV. 527.
[3] See Beale and Wyman, Railroad Rate Regulation, c. XLI.
[4] *Ex parte* Young, 209 U. S. 123.
[5] Smyth *v.* Ames, *supra*. *Cf.* Reagan *v.* Farmer's Loan and Trust Co., 154 U. S. 362, where the provision for review was construed to include access to the federal court.
[6] Va. Const., Art. XII, § 156 (g).
[7] Steenerson *v.* Great Northern Ry. Co., 69 Minn. 353. *Cf.* Western Union Tel. Co. *v.* Myatt, 98 Fed. 335.
[8] See 21 HARV. L. REV. 204.
[9] See Taylor *v.* Carryl, 20 How. (U. S.) 583.